IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2602

LARRY MANN,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,
Attorney General,

Additional Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

JULIUS J. AULISIO
ASSISTANT CCRC
FLORIDA BAR NO. 0561304

Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544

COUNSEL FOR PETITIONER

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MR. MANN'S PETITION FOR WRIT OF HABEAS CORPUS IS NEITHER UNTIMELY NOR ABUSIVE.

Though this Court has previously denied motions to dismiss based on the very same arguments, Respondent repeats them in its response to Mr. Mann's petition. *See Appendix A.*

Respondent cites Florida Rule of Appellate Procedure 9.140 (j)(3)(B) as authority for her allegation that Mr. Mann's petition for habeas corpus relief is untimely and abusive. However, Respondent neglected to cite section (b)(6)(E) of the very same Rule, which specifically states, "[s]ubdivision (j) of this rule shall not apply to death penalty cases." Fla. Rule App. Pro. 9.140 (b)(6)(E). Respondent also neglected to note that the Committee Notes discussing the 1996 amendments to Rule 9.140 specifically state that Rule 9.140(b)(6)(E) "also makes clear that the time periods in rule 9.140(j) do not apply to death penalty cases." Thus, Mr. Mann's petition for habeas corpus is not untimely under Rule 9.140(j)(3)(B). Respondent's spurious request that this Court deny Mr. Mann's petition, citing a rule that clearly does not apply to this case, must be denied.

Respondent also asserts that this Court should dismiss this petition as untimely under McCray v. State, 699 So.2d 1366 (Fla. 1997). This is likewise a disingenuous claim because McCray is clearly distinguishable from Mr. Mann's case. On direct appeal, this Court reduced Mr. McCray's death sentence to life without a possibility of parole for 25 years. McCray v. State, 416 So.2d 804

(Fla. 1982). Fifteen years later, Mr. McCray filed a petition for habeas corpus, relying on Rule 9.140(j)(3)(B) of the Florida Rules of Appellate Procedure. At the time this Court dismissed Mr. McCray's petition, Mr. McCray's case was not a death penalty case, the petition was filed fifteen years after his conviction and sentence became final, and he relied on a rule that clearly does not apply to Mr. Mann's case.

Mr. Mann's petition is timely. Mr. Mann did not, as the Respondent asserts, wait several months after the conclusion of his postconviction appeal to file his habeas petition (RB 14). Though there is no specific deadline for death penalty cases in which the conviction and sentence were final before January 1, 1994, Mr. Mann filed his petition for habeas corpus relief less than one month after this Court issued the mandate denying his 3.850 appeal. *See* Robinson v. Moore,773 So.2d 1 n.1 (Fla. 2000). Mr. Mann's petition is clearly not, as the Respondent asserts, unconscionable or dilatory (RB 11). Mr. Mann's petition for habeas corpus relief was timely filed, and Respondent's request that this Court dismiss it as untimely and abusive must be denied.

CLAIM I

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT'S CORRESPONDING ERRORS ON APPEAL.

1. Procedural application of Apprendi

A. Respondent first claims that Apprendi is new law, the application of which counsel could not foresee (RB 16-17). The United States Supreme Court stated a law is new if "the result was not dictated by precedent existing at the time the defendant's conviction became final". Teague v. Lane, 489 U.S. 288, 301 (1989). The result in Apprendi was clearly dictated by precedent existing at the time Larry Mann's sentence became final, and Apprendi, therefore, did not announce new law.

In Winship, the United States Supreme Court held, "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In the Matter of Samuel Winship, 397 U.S. 358, 364 (1970). In Mullaney v. Wilbur, the Supreme Court extended Winship's protections to determinations of length of sentence as well as determinations of guilt and innocence. Mullaney v. Wilbur, 421 U.S. 684, 699 (1975). This was consistent with the common law notion that:

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170].

Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000) *quoting* Archbold, Pleading and Evidence in Criminal Cases, at 51.

In McMillan v. Pennsylvania, the Supreme Court held that a Pennsylvania statute did not violate the Winship and Mullaney boundaries because it limited the sentencing judge's discretion within the available range of penalties:

> Section 9712 **neither alters the maximum penalty for the crime committed** nor creates a separate offense calling for a separate penalty within the range already available to it without the special finding of visible possession of a firearm.

McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986)(emphasis added).

The precedent existing at the time of Larry Mann's second penalty phase dictated that provisions which increase a maximum penalty for a crime committed are elements of the crime which must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The aggravating factors in Larry Mann's case did not comply with these standards dictated by the Sixth and Fourteenth Amendments, and the resentencing court refused to

correct these errors by denying Larry Mann's Motion for Statement of Aggravating Circumstances and demurrer to the indictment (S.S. Vol. I, 97, 155-62, Vol. II, 220-224). Appellate counsel performed deficiently by failing to raise these errors on appeal. Had appellate counsel raised these errors on appeal, this Court probably would have vacated Mr. Mann's death sentence and remanded his case for a new penalty phase.

B. Alternatively, if, as Respondent suggests, Apprendi is new law, it is new law for which Teague permits retroactive application (RB 16-17). Before Apprendi, the law was "susceptible to debate among many reasonable minds" because no case before Apprendi specifically stated that, under state law, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Butler v. McKeller, 494 U.S. 407, 415 (1990); Apprendi, 120 S.Ct. 2348, 2355 *citing* Jones v. United States, 526 U.S. 227, 243, n.6 (1999).

This new law must be applied retroactively because retroactively, it will improve accuracy and "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding". Sawyer v. Smith, 497 U.S. 227, 243 (1990)(citations omitted). Retroactive application would improve the accuracy because Larry Mann would have the notice and opportunity to defend against aggravating factors to ensure the

appropriate sentence. The fundamental Sixth Amendment and Fourteenth Amendment rights compelled under Apprendi are "bedrock procedural elements essential to the fairness of a proceeding". Sawyer v. Smith, 497 U.S. 227, 243. Thus, Apprendi is new law which must be applied in Larry Mann's case.

2. Application of Apprendi under Florida law

The Florida Legislature's plain language in Florida Statute 775.082 now, and at the time of Larry Mann's second penalty phase, clearly makes aggravating circumstances elements of death penalty eligible first degree murder rather than sentencing considerations (RB 19-21). Because, under Florida law, the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict alone, the aggravator is an element of the death penalty eligible offense which must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, at 2365.

Though the Apprendi majority specifically upheld the Arizona death penalty sentencing scheme addressed in Walton v. Arizona, the Court did not address the Florida death penalty scheme which is significantly different. Apprendi, 120 S.Ct. at 2366 *citing* Walton v. Arizona, 497 U.S. 639, 647-49 (1990). The Arizona statute upheld in Apprendi provides:

> **A person guilty of first degree murder as defined in § 13-1105 shall suffer death** or imprisonment in the custody of the state department of corrections for life as

> determined in accordance with the procedures provided in subsections B through G of this section.

§ 13-703 Arizona Statutes (1985)(emphasis added). Death is clearly within the maximum penalty for first degree murder in Arizona.

Contrarily, in Florida, death is not within the maximum penalty for a mere conviction of first degree murder. At the time of Larry Mann's second penalty phase, Florida statute 775.082 provided:

> A person who has been convicted of a capital felony **shall be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole **unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.**

§ 775.082 Fla. Stat. (1989)(emphasis added). If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. § 775.082 Fla. Stat. (1994). Therefore, in Florida, unlike Arizona, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increases the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

This critical difference between the Florida and Arizona sentencing schemes proves that the dicta in Apprendi upholding the

Arizona scheme does not apply to Florida. Florida statute 775.082 clearly puts death outside the statutory maximum penalty for Apprendi analysis, and is therefore, unconstitutional.

The Florida death penalty sentencing statute was unconstitutional as applied in Larry Mann's case. The trial court erred in denying the motions which could have corrected the constitutional errors. Because the court denied Larry Mann's Motion for Statement of Aggravating Circumstances and demurrer to the indictment, he was tried by ambush (S.S. Vol. I, 97, 155-62, Vol. II, 220-224). For example, had the indictment stated the aggravators the state intended to prove to make Larry Mann eligible for the death penalty, he would have known that the prosecution intended to use the lewd and lascivious assault on a child under 14 instruction with the felony murder aggravator, and prepared an appropriate defense. *See* Mann v. State, 603 So.2d 1141, 1143 (1992).

Appellate counsel was ineffective for failing to raise on appeal that the Statute as applied violated Larry Mann's Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and that the trial court erred in refusing to grant motions which could correct those errors. Neither the constitutional errors, nor appellate counsel's errors are harmless. The denial of a jury verdict beyond a reasonable doubt has unquantifiable consequences and is a "structural defect in the constitution of the trial mechanism,

which defies analysis by 'harmless error' standards". Sullivan v. Louisiana, 508 U.S. 275, 2081-83 (1993) *quoting* Arizona v. Fulminante, 499 U.S. 279, 308-312 (1991).

CLAIM II

THE PROSECUTOR'S MISCONDUCT THROUGHOUT THE PENALTY PHASE RENDERED LARRY MANN'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE TRIAL COURT ERRED IN ALLOWING THE MISCONDUCT WHICH VITIATED LARRY MANN'S RIGHTS TO A FAIR PENALTY PHASE AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE TRIAL COURT'S ERROR AND THE STATE'S UNCONSTITUTIONAL MISCONDUCT IN MAKING SEXUAL ASSAULT THE FOCUS OF LARRY MANN'S PENALTY PHASE. THIS VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Claims II and III are intricately related. Using improper argument and improper introduction and focus on collateral character evidence, the prosecution changed the focus of Larry Mann's penalty phase from the proper weighing of aggravating and mitigating circumstances to improper character attacks and insinuations of unproven crimes. The prosecutor's remarks and insinuations became the focus of Larry Mann's penalty phase. The

questions the jury submitted to the court during deliberations clearly prove that the jury considered the improper character evidence and insinuations of other unproven crimes when deciding whether Larry Mann would live or die (S.S. Vol. XVI 2081-82). This denied Larry Mann his constitutional rights to a fair penalty phase. Sims v. State, 602 So.2d 1253, 1257 (Fla. 1992). Had appellate counsel raised this fundamental error on appeal, this Court probably would have vacated the death sentence and remanded the case for a new penalty phase.

ARGUMENT AS TO REMAINING CLAIMS

Mr. Mann will rely on argument presented in his initial Petition for Writ of Habeas Corpus regarding these issues.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Mann respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the following has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of February, 2001.

_____
Julius J. Aulisio
Florida Bar No. 0561304
Assistant CCRC-Middle

_____
Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Courier non-proportional, 12 point font, pursuant to Fla. R. App. P. 9.210.

_____
Julius J. Aulisio
Florida Bar No. 0561304
Assistant CCRC-Middle

_____
Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Petitioner

Copies furnished to:

The Honorable James R. Case
Circuit Court Judge
Clearwater Courthouse
315 Court Street, Room 417
Clearwater, Florida 33756

Douglas Crow
Assistant State Attorney
Office of the State Attorney
14250 49th Street North
Clearwater, Florida 33762-2800

Carol Dittmar
Assistant Attorney General
Office of the Attorney General
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607

Larry Mann
DOC# 077663; P6112S
Union Correctional Institution
Post Office Box 221
Raiford, Florida 32083